IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.416 OF 2005

Shri.Gulab B.Mahabari,
since deceased, by LRs & Ors. .. Appellants
V/s
Shri.Vitthal D.Karande .. Respondent

Mr.V.M.Mali for the Appellants.
Mr.R.V.More for the Respondent.

CORAM: A.S.OKA,J.
DATE : 05.05.2005.

P.C.:

1. Heard the learned Advocates appearing for the parties. The Appeal is by the legal representatives of the original Defendant challenging the decree passed by the Appellate Court for redemption of mortgage.

2. The learned Advocate for the Appellant submitted that the Plaintiff claims to be adopted son of the mortgagor. In the Plaint there is no reference to the adoption. He has submitted that, therefore, the Courts could not have considered the case of the original plaintiff on the basis of adoption. He submitted that in any event, there is no evidence on record to show that adoptive mother had consented to the adoption. He submitted that the original Defendant died during the pendency of the appeal in First Appellate Court and all the legal representatives of the deceased Defendant were not brought on record. Lastly he submitted that real nature of the transaction was not mortgage.

3. I have considered his submissions. It is obvious from the judgments of the Courts below and the notes of evidence produced before me that both the parties were aware that adoption of the original plaintiff was very much in issue in the suit and accordingly, both the parties have led evidence on adoption. The Trial Court may not have framed an issue regarding legality of the adoption. However, the Trial Court has made elaborate discussion and has recorded the finding. Therefore, failure to plead existence of deed of adoption is not fatal to the case of the original plaintiff.

4. The Appellate Court has considered the evidence on record. The Appellate Court has rightly held that it is not mandatory that adoptive mother should record her consent in writing to the adoption in the deed of adoption. The Appellate Court has held that the adoptive mother was present at the time of ceremony of adoption and also when the deed of adoption was registered. Considering the oral evidence on record, the Appellate Court has recorded finding of fact that there was consent by adoptive mother. There is no perversity in the said finding of the Appellate Court.

5. Perusal of the judgment of the Appellant Court shows that last two submissions made by the learned Advocate for the Appellant before me were not made before the

Appellate Court. Both the submissions are based on factual aspects. Therefore, it is not permissible for the Appellant to make said submissions for the first time in the Second Appeal.

6. No substantial question of law arises in this matter. Second Appeal is therefore dismissed. No order as to costs.

JUDGE